IN THE SUPREME COURT OF THE UNITED STATES

# Supreme Court of the United States

October Term, 1974

No. 74-[illegible]

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TROOPERS LODGE No. 41, FRATERNAL ORDER OF POLICE, an Illinois not-for-profit corporation, as representative of its members employed by the State of Illinois; HENRY SZUDRSKI, Trooper of Cook County, Illinois; ROGER E. LOGUE, Trooper of Sangamon County, Illinois; LESTER L. CHINNING, Sergeant, Sangamon County, Illinois; JOHN OLDANI, Trooper, Madison County, Illinois; MIKE DONOVAN, Trooper, St. Clair County, Illinois; and PETE McALLISTER, Trooper, Peoria County, Illinois, and BILLIE JOE RIVERS, Trooper, Sangamon County, Illinois,

Petitioners,

vs.

DANIEL WALKER, as Governor of the State of Illinois; ABNER J. MIKVA, as Chairman of the Illinois Board of Ethics; GEORGE M. BURDETT, as member of the Illinois Board of Ethics; JOHN KINNEMAN, as member, as member of the Illinois Board of Ethics; WARD FOODY, as Executive Director of the Illinois Board of Ethics; and DWIGHT E. PITMAN, Superintendent, Illinois State Highway Police,

Respondents.

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

**No. 74-350**

TROOPERS LODGE No. 41, FRATERNAL ORDER OF POLICE, an Illinois not-for-profit corporation, as representative of its members employed by the State of Illinois; HENRY SIKORSKI, Trooper of Cook County, Illinois; ROGER BOONE, Trooper of Sangamon County, Illinois; LESLIE GUNNING, Sergeant, Sangamon County, Illinois; JOHN OLDANI, Trooper, Madison County, Illinois; MIKE DONOVAN, Trooper, St. Clair County, Illinois; and PETE McALLISTER, Trooper, Peoria County, Illinois, and BILLIE JOE BIVENS, Trooper, Sangamon County, Illinois,

Petitioners,

vs.

DANIEL WALKER, as Governor of the State of Illinois; ABNER J. MIKVA, as Chairman of the Illinois Board of Ethics; GEORGE M. BURDITT, as member of the Illinois Board of Ethics; JOHN KINNEMAN or his successor, as member of the Illinois Board of Ethics; WALT FOODY, as Executive Director of the Illinois Board of Ethics; and DWIGHT E. PITMAN, Superintendent, Illinois State Highway Police,

Respondents.

## RESPONDENTS BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

## QUESTIONS PRESENTED FOR REVIEW

(1) Have the petitioners raised a substantial federal question in their petition by alleging that Executive Order No. 4 (1973) and the financial disclosure statement promulgated pursuant thereto, constitute an invasion of privacy, denial of equal protection of the laws, due process of law or freedom of association?

(2) Should the petition be denied because the petitioners have failed to raise a substantial federal question?

(3) Should the petition be denied because the decision of the Supreme Court of Illinois is justified on independent and adequate state grounds?

(4) Should the petition be denied because the issues in this action have not reached the level of concreteness, adversity and ripeness appropriate for review?

## STATEMENT OF CASE

On February 26, 1973, the Governor of the State of Illinois, DANIEL WALKER, issued Executive Order No. 4 (1973) entitled "Ethics Disclosure" (Pet. App. C) (hereinafter the "Executive Order") which established a policy of financial disclosures by certain state employees and appointed officers in the Executive Branch of government. The Executive Order created the Illinois Board of Ethics (hereinafter "the Board") and vested it with authority to promulgate certain rules and regulations and to supervise the administration of the Executive Order and the annual filing with the Board of a statement of economic interest from each employee. The Board was composed of three individuals appointed by the Governor.

The Board's initial task was to determine which persons within the Executive Branch would be required to file a statement of economic interest (hereinafter the "statement"). This involved a two-fold process: first, the Board determined which state agencies had vouchers subject to approval by the Department of Finance and were thus subject to the jurisdiction of the Board; and, second, the Board determined which officers and employees within those particular departments or agencies would be required to file.

The full extent of the Board's jurisdiction had not been resolved at the time of trial, and, because of the preliminary injunction issued by the trial court, has not as yet been finally determined. In addition to the agencies whose vouchers are subject to approval by the Department of Finance, various other agencies within the Executive Branch have been brought within the jurisdiction of the Board.[1]

The Executive Order specifies three categories of persons who are required to file statements:

(a) Each person appointed by the Governor;

(b) Each person who receives $20,000 or more per year from the State; and

(c) Each other person whose position is subject to undue influence (as determined from time to time by rule of the Board).

Persons who fall into the first two categories are readily ascertainable; however, because petitioners do

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1. *E.g.*, employees within the Governor's office, the Bureau of the Budget, the Governor's office on Human Resources, and the Board of Ethics itself.

not fall within those two classes, questions pertinent thereto are not now in issue. In order to determine which positions in the Executive Branch should be considered subject to "undue influence," the Board requested, on March 26, 1973, that the various agency heads submit lists of job titles and job classifications which the agency heads considered to be subject to undue influence. The Board examined and, where appropriate, discussed, these lists with the various agency heads, suggesting that either additional positions be included or that some positions be excluded. On May 14, 1973, the Board formally adopted its selections. Subsequently, the Board received additional lists of job classifications which it has not considered, pending dissolution of the preliminary injunction entered by the trial court and the stay issued pending appeal.

The petitioners in the instant case are composed solely of state troopers, who are members of the State Police, a division of the Department of Law Enforcement. In the earlier stages of this action the petitioners' claim was one of three class actions brought to contest the validity of the Executive Order and the Board's action. Only the state troopers have contested the Supreme Court of Illinois' decision.

The evidence shows that prior to May 14, 1973, the Fraternal Order of Police and the Illinois Police Association took the position that the state troopers should not have to file statements. A hearing was held on May 24, 1973 at which time testimony was taken, and the Board subsequently advised petitioners that they would not have to file statements until further notice. In addition, the Board has received approximately 25 objections raised by certain individuals which had not been

ruled upon at the time of trial. In order to develop the basic format as well as the content of the statement, the Board held a public hearing to discuss the contents of proposed forms and instructions and invited many state employee organizations to attend to present their comments.

The Board decided that adjusted gross income as defined on the federal income tax Form 1040 should be included as part of the statement. Employees were given the option of enclosing a copy of Schedule D of the federal Form 1040 income tax return with the statement instead of restating capital gain transactions on a separate sheet of paper. Copies of federal and state income tax returns were also required to be submitted. These documents were not made a part of the statement and, by rule of the Board, are not open to public inspection. Rather, they are sequestered in separate filing cabinets apart from the statements. The forms were distributed through agency and department heads with approximately 6800 persons in over 80 agencies being initially required to file statements. As previously stated, approximately 1800 state troopers and 25 individuals were not under any obligation to file due to their objection to the filing requirement.

Due to the pendency of these proceedings and the injunctive restraints imposed by the trial court, the Board has not been able to promulgate rules and regulations to provide for an orderly system of public disclosure or to provide for a system of examining the statements, nor has the Board had the opportunity to determine what kind of financial relationships might cause conflicts of interest or how to assist state employees in managing

any conflicts of interest which arise. As of this date the Board has not permitted public inspection of any disclosure statements. Until public hearings can be held on the matter, the Board does not propose to issue rules and regulations regarding public disclosure or to permit examination of such statements.

Finally, because of these proceedings, the Board has not been able to consider amendments, alterations or substitutions of its rules, regulations and procedures, or to consider and implement the decision of the Supreme Court of the State of Illinois.

## ARGUMENT

### I.

### THE PETITION IN THE INSTANT CASE SHOULD NOT BE GRANTED BECAUSE PETITIONERS HAVE FAILED TO RAISE A SUBSTANTIAL FEDERAL QUESTION.

In *Zucht* v. *King*, 260 U.S. 174 (1922), this Court established the principle that the jurisdictional requirements for federal review of a high state court decision included not only the finality of the state court judgment, but the presentation of a substantial federal question. While the appellate jurisdiction of this Court extends, on its face, to all final decisions of a state's highest court in cases where any right, title, privilege or immunity is specially set up or claimed under the Constitution of the United States, *Zucht* clearly established that implicit in that jurisdictional grant was the threshold requirement that the cause present a substantial federal question.

In *Sugarman* v. *U.S.*, 249 U.S. 182, 184 (1918), this Court recognized that, though the validity of the law was formally drawn into question by the writ, such was insufficient to sustain jurisdiction when it appeared that the constitutional question presented was not substantial in character.

The petitioners in the instant case, though nominally presenting a federal constitutional question, have failed to meet the jurisdictional requirement of substantiality. In their petition, petitioners have alleged that Executive Order No. 4 (1973), and the financial disclosure state-

ment promulgated to implement that Order, violate petitioners' general constitutional rights to "privacy," "equal protection of the law," "due process," and "freedom of association." Although the petitioners have failed to specify the provisions of the United States Constitution upon which they rely, it appears that they are attempting to invoke the protection of the First, Fifth and Fourteenth Amendments to the United States Constitution and the certain "penumbras" which have been found to be implicit therein.

While no longer contesting the constitutional authority of the Governor to order state employees to make financial disclosures, the petitioners again assert that the Order in issue and as implemented is constitutionally infirm by virtue of being vague and overbroad, is an unreasonable invasion of privacy, and is discriminatory, as well as being a restraint on the freedom of political association.

It is submitted that these alleged federal constitutional issues are insubstantial in the overall context of the present litigation. The petitioners are not before this Court as private citizens, but are public employees belonging to that class known as state troopers. As such, they do not have standing to assert claims on behalf of public employees in any other department of the Executive Branch or on behalf of spouses of public employees. Conversely, because petitioners are public employees and, more particularly, are employed as members of the state police force, their conduct is more susceptible to regulation than that of private citizens or even that of other state employees. Since the petitioners are not presently threatened with any penalties for failing to file a financial statement or for filing an incomplete financial state-

ment, because the Board has not finally determined that all troopers must file financial statements, this controversy can only be concerned with a challenge to the Order and the financial statement on the grounds that on the face of these documents they are clearly repugnant to the United States Constitution. Instead of seeking an adjudication whether a specific application or interpretation of the Order has or immediately threatens to abridge an individual petitioner's constitutional rights, petitioners have raised a general objection that the Order and the financial statement on their face are inherently defective. Both the trial court and the Supreme Court of Illinois have addressed themselves to the petitioners' arguments and have upheld the Order and the financial statement. While a case might arise *in futuro* which would present a concrete factual situation in which the Order as interpreted or applied could violate the petitioners' rights as alleged, the Court found that petitioners had clearly failed to demonstrate that either the Order or the financial statement was invalid on its face.

In rendering its decision the Supreme Court of Illinois rejected the petitioners' alleged violation of their right to privacy as well as the petitioners' cavalier attempt to analogize the instant situation to that present in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). The court correctly analyzed the present situation, noting that this is not a case in which a court is being called upon to deal with the most intimate relationship of husband and wife, or with an effort by the state to control their decision as to bearing children. Rather, the court is called upon to review a state requirement that the financial affairs of persons who are paid by the public, who occupy positions of high public trust and who historically are subject

to close scrutiny and regulation of their personal affairs, be disclosed.

It is this relationship of public employer and public employee that is being regulated. The requirements of disclosure of economic assets and interests is neither the only, nor the most significant manner in which the legal rights of those who accept public employment are distinguished from the rights of private citizens. A striking example of this distinction, found in this Court's treatment of a public employee's right to sue for defamation, was noted by the Illinois Supreme Court:

> "Since the decision of the Supreme Court of the United States in New York Times Co. v. Sullivan (1965), 376 U.S. 254, 11 L.Ed.2d 686, 84 S. Ct. 710, the right of a public official or employee to recover damages for false and defamatory slander and libel charges which may destroy his good name have been curtailed (see St. Amant v. Thompson (1968), 390 U.S. 727, 20 L. Ed. 2d 262, 88 S. Ct. 1323; Ocala Star-Banner Co. v. Damron (1971), 401 U.S. 295, 28 L. Ed. 2d 57, 91 S. Ct. 628; Restatement (Second) of Torts (Tent. Draft No. 20) sec. 581)A, 57 Ill. 2d 512, —— N.E. 2d —— (1974) (Pet. App. A, p. 30)).

A careful analysis of the present situation demonstrates the fundamental misapprehension upon which the petitioners' argument is fashioned. While strenuously asserting that the respondent has unconstitutionally invaded petitioners' right to privacy, the petitioners have chosen to ignore prior decisions of this Court which have consistently upheld the right of a public employer to impose limitations on certain rights and activities of public employees, although such limitations might not be permissible in the private sector. In *United Public Workers of America* v. *Mitchell*, 330 U. S. 75 (1947), this Court stated:

> "For regulation of employees, it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the Public Service." 330 U.S. at 101.

More recently, in *United States Civil Service Commission* v. *National Association of Letter Carriers, AFL-CIO*, 413 U.S. 548 (1973), this Court "unhesitantly reaffirm[ed]" the *Mitchell* case in the course of its opinion sustaining the Hatch Act prohibition of political activity on the part of federal employees. 413 U.S. at 556. The Court observed:

> "But, as the court held in Pickering v. Board of Education, 391 U.S. 563, 568 (1968) . . ., the government has an interest in regulating the conduct and 'the speech of its employees that differ [S] significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interest of the [employee], as a citizen . . . and the interest of the [government], as an employer. . . .' Although Congress is free to strike a different balance than it has, if it so chooses, we think the balance it has so far struck is sustainable by the obviously important interest sought to be served by the limitations on partisan political activities[2] now contained in the Hatch Act." 413 U.S. at 564-565.

Contrary to petitioners' belief, the State of Illinois throughout all of its branches has long recognized a crucial and compelling interest in insuring honesty among government officials and employees. This prohibition against

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2. *See also*, Broadrick v. Oklahoma, 413 U.S. 661 (1973).

conflicts of interest has been recognized at common law, by constitution, and by statute.[3]

Futhermore, prior to this action the State of Illinois has shown a special interest in regulating the activities of the instant petitioners, who are members of the state police, by enacting the Illinois State Police Act (Ill. Rev. Stat. ch. 121, § 307.15 *et. seq.* (1973)) which prohibits any participation in partisan political activities by state police.

It is quite evident that the legislative, judicial and executive branches of the state government, as well as the framers of two Illinois constitutions and the people of the State of Illinois have determined that the public disclosure of economic interest is a primary means of preventing conflicts of interest within state government. While it may be inappropriate to require every public

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3. *See* Panazzo v. City of Rockford, 306 Ill. App. 433, 28 N.E. 2d 748 (1940); Cruse v. Streamwood Utilities Corp., 34 Ill. App. 2d 100, 180 N.E. 2d 731 (1952); Ill. Rev. Stat., ch. 102, § 3 *et . seq.* (1973) (specifically prohibiting conflicts of interest by all elected or appointed state officials); Illinois Constitution of 1870, (Article 8, Section 4); the Governmental Ethics Act of 1967, Ill. Rev. Stat., ch. 127, § 601 *et seq.* (1971), now superseded by the 1972 Act of said title, Ill. Rev. Stat., ch. 127, § 601 *et. seq.* (1972); Illinois Constitution of 1970, (Article 13, Section 2); Illinois Supreme Court Rules, 61-71, Ill. Rev. Stat. ch. 110A, § 61 *et seq.* (1973); Executive Order No. 4 (1970), (The Honorable Richard Ogilvie, Governor of the State of Illinois, setting forth the code of conduct for employees subject to the Governor's jurisdiction and readopting and continuing an Executive Order originally issued by then Governor Otto Kerner in 1967).

employee, regardless of positions, to make full and complete financial disclosures, the overriding interest of the public welfare mandates that those who are in positions of public trust and confidence and have the power to influence or control decisions in government, be required to maintain their private affairs so as to avoid any actual or potential interferences or conflicts of interest with their public employment.

The type of disclosure in issue helps to prevent conflicts of interest and reassures the public that no conflicts of interest exist because: (1) it insures that the officials responsible for preventing conflicts of interest and the public will obtain the information necessary to detect conflicts of interest; (2) it establishes a system whereby state employees must necessarily achieve a greater awareness of possible or potential conflicts of interest, and whereby the Board of Ethics can assist state employees in managing such conflicts; and, (3) it serves to dispel public suspicion engendered by past governmental misconduct while instilling trust in government. When these important state interests in financial disclosure are weighed against the petitioners' right to privacy it is apparent that the Executive Order and the Board's action do not impermissibly deprive state employees of their right to privacy guaranteed by the Constitution of the United States, as noted by the Supreme Court of the State of Illinois and the Circuit Court of Sangamon County:

> "As noted, in the balancing of the individual employee's fundamental right to privacy and the state's compelling need for efficient, ethical government, the state's interest predominates. To promote its interest, the state is requiring complete financial dis-

> closure. Such a means is substantially related to the end and is not overbroad. While full financial disclosure is burdensome, anything less would be ineffective in accomplishing the goal. . . . It is misleading, and ultimately undermining of public confidence, to institute a disclosure program having exemptions as broad as the coverage. The inclusion of dollar amounts is justified because it allows for detection of many more types of unethical conduct." 57 Ill. 2d 512, —— N.E. 2d —— (1974) (Pet. App. A, p. 32).

The petitioners have also alleged a two-fold abridgement of their right to equal protection of the laws. First they argue that the jurisdictional limitation of the Board's power to those departments and agencies "whose vouchers are subject to approval of the Department of Finance" constitutes an unreasonable classification and an impermissible discrimination between members of one class. Second, they contend that requiring all those who occupy "positions subject to undue influence" imposes a vague and indefinite standard not susceptible of precision or uniformity in application.

Petitioners' contention that the limitation on the Board's authority to those departments and agencies whose vouchers are subject to approval of the Department of Finance, impermissibly discriminates between members of the same class and attempts to treat members of the same class differently, presents no federal constitutional claim meriting further argument or consideration by this Court. The basis of that limitation is derived from the constitutional structure of Illinois government and from the organization of the executive branch of government in the State of Illinois, rather than from any attempt to discriminate against petitioners.

The State Finance Act (Ill. Rev. Stat. ch. 127, §135.1) establishes a system for controlling state expenditures. In Section 10 of that Act (Ill. Rev. Stat., ch. 127, §146), the Legislature has provided that all code departments and all boards and agencies, with certain limited and specific exceptions, are not permitted to draw funds from the State Treasury unless their vouchers have been approved by the Department of Finance. The Director of the Department of Finance, who is appointed by the Governor, must report to the Governor, and is thus subject to his control. (Ill. Rev. Stat. ch. 127, §§12, 25).

There are certain exceptions under this system, however, such as the secretary of state; for the various courts; for the two legislative bodies; and for the various universities and state colleges. The Illinois State Toll Highway Authority which collects its own revenues, has a separate fund held by the state treasurer, and which can draw on that special fund without the approval of the Department of Finance (Ill. Rev. Stat. ch. 127, §314) is similarly excepted. In establishing these exceptions, the Legislature has manifested its intention that the excepted groups be independent from financial control by the Department of Finance which is ultimately subject to the control of the Governor.

The jurisdiction of the Board thus includes those agencies and departments over which the Governor exercises the most direct control, while at the same time preserving the scheme of intra-governmental relationships established in the Illinois Constitution as effectuated by the acts of the Illinois Legislature. The state employees excluded from the jurisdiction of the Board work for governmental bodies of a totally different nature than the state police, and, in many cases, for organizations outside the juris-

diction of the Governor of the State of Illinois. In fact, the petitioners' enumeration of the supposedly significant offices or organizations which are not covered by this Order reveals the inherent fallacy in petitioners' argument of denial of equal protection. The vouchers of the Lieutenant Governor's office, the Secretary of State, the State Treasurer, the Superintendent of Public Instruction, the Attorney General, and the Comptroller are subject to control and review within the respective independent executive offices, which are each headed by an independently elected state official. The vouchers of the Courts and the Legislature of the State of Illinois are subject to review by their respective branches because they are indefendant and co-equal branches of government. Their internal operation and organization are wholly without the scope of power of the executive. Again, the Board of Governors of state colleges and universities is an independent agency created by the Legislature whose function was specifically intended to remain free from interference or control by the Governor.[4] As to the vouchers for the Governor's office, the issue is moot. As was shown at trial, the Governor, subsequent to the issuance of Executive Order No. 4 (1973), subjected all employees of the Governor's Office to the jurisdiction of the Board, notwithstanding the fact that said vouchers were not subject to approval of the Department of Finance.

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4. It should be noted that numerous governmental bodies and agencies which the petitioners have alleged to be impermissibly exempted from disclosure requirements, are, in fact, already required to make disclosure, pursuant to the Illinois Governmental Ethics Act (Ill. Rev. Stat. ch. 127 §601-101 *et seq.*, as amended by P.A. 77-1806, January 24, 1972).

Further, it is not necessary to question whether the Governor should have included bodies such as those listed above because where, as here, there is a rational classification whereby exclusions are consistent with the purposes of governmental action, there is no denial of equal protection *McGowan* v. *State of Maryland*, 366 U.S. 420 (1961).[5]

The Supreme Court of Illinois has on prior occasions shown that it has a firm understanding of the proper equal protection standard and has applied it correctly to Illinois intra-governmental relationships, particularly in the realm of disclosure requirements.

Furthermore, petitioners' attempted reliance on *Yick Wo* v. *Hopkins*, 118 U.S. 355 (1886) and *Rinaldi* v. *Yeager*, 384 U.S. 305 (1966), is misplaced. The principles announced in the latter cases reveal that in defining a class subject to legislation, the equal protection clause is not violated when distinctions drawn have "*some relevance* to the purpose for which the classification is made." (384 U.S. at 308) (Emphasis added). Both the trial court and the Supreme Court of Illinois in the instant case have examined the relationship between the Executive Order and the purposes for which it was promulgated and have found this classification to pass constitutional muster.

The petitioners do not contend that the Supreme Court of Illinois has applied an improper standard to determine

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5. *See also*, Kotch v. Board of Riverport Pilot Commissioners, 330 U.S. 552 (1947), Metropolitan Casualty Insurance Company of New York v. Brownell, 294 U.S. 580 (1935); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911); Atchison, T. & S. F. R. Co. v. Matthews, 174 U.S. 96 (1899).

their equal protection claims; rather, they challenge the Court's application of that standard to the particular intra-governmental relationships in the State of Illinois.

The Supreme Court of Illinois has, on prior occasions, shown that it has a firm understanding of the proper equal protection standard and has applied it correctly to Illinois intra-governmental relationships, particularly in the realm of financial disclosure requirements.[6] In addition, it is well settled that the equal protection clause is not violated if a state chooses to take action in one area while abstaining from such action in another area. A state is not required to address itself to all aspects of a problem at one time; rather, it may address itself to that phase of the problem which it deems most acute. The prohibition of the equal protection clause goes no further than *invidious discrimination.*[7]

In the instant case, the facts demonstrate that the exclusion of certain agencies, boards and other bodies does not rest on grounds "wholly irrelevant to the achievement of a state's objective," nor does it constitute an "invidious discrimination;" it does have "some relevance" to the purpose for which the classification is made.

Petitioners' second allegation concerning a denial of equal protection and due process of law is similarly fatally defective and fails to raise any substantial federal

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6. Stein v. Howlett, 52 Ill. 2d 570, 289 N.E. 2d 409 (1972), *app. dismissed*, 93 S. Ct. 2750 (1973).

7. *See* Williamson v. Lee Optical, 348 U.S. 483 (1955); Tigner v. Texas, 310 U.S. 141 (1940); Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608 (1935); A. F. of L. v. American Sash Co., 335 U.S. 538 (1949).

question. By concentrating on a supposed lack of specificity in the requirement that those holding "positions subject to undue influence" must file financial disclosure statements, the petitioners conveniently ignore the fact that the Board has been invested with the power, authority and responsibility to determine which positions within the scope of its jurisdiction are susceptible to "undue influence."

As previously noted, the Board requested all agency department heads to submit lists of those job classifications which the particular department or agency deemed to be susceptible to undue influence or abuse. The Board met and reviewed these lists to determine whether, in its independent opinion, each particular position was one which required the holder thereof to file a financial disclosure statement. If the Board determined that the position in question was not one subject to undue influence, then the inquiry was concluded and the holder of that office was not required to file a statement. However, if the Board determined that the position was subject to undue influence, the Board sent the employee in question a notice that he was required to file the financial disclosure statement. The rules of the Board provided that upon receipt of this notice any individual employee had the right, within a prescribed period of time, to object to the determination of the Board and to demand a hearing before the Board. The Board was then required to hear and to consider any evidence and/or argument from the objecting employee. Until such time as the decision of the Board was announced and the employee notified thereof, the employee was under no obligation to file a financial disclosure statement. In the case of the instant petitioners,

the Board has met and has heard evidence but has not reached a final decision of whether the petitioners are subject to the reporting requirements. Thus, at the present time, the petitioners are not obligated to file financial disclosure statements.

Through the use of the aforementioned procedures, it is the intention of the Board to develop a consistent and meaningful standard for determining which positions in state government are subject to undue influence. Because of the peculiarities and the needs of the many agencies, commissions and departments under Board's jurisdiction, any such definition will, of necessity, be a transactional one looking to the particular duties, responsibilities, powers and discretion of the position involved. In order to safeguard the rights of each employee the Board has provided the foregoing procedures in an effort to fairly and conscientiously apply filing requirements. The Supreme Court of Illinois found this procedure to be manifestly correct, stating:

> "The record shows that the objections were filed by some employees, but that because of the issuance of a preliminary injunction in this case, the objections have not as yet been ruled upon. In our opinion, the Board pursued a reasonable course in permitting those having supervisory authority to make the initial determination as to the vulnerability of particular positions, subject to specific review by the Board. We hold that the rights of any effective person to due process of law or to equal protection of law have not been violated by the procedure employed." 57 Ill. 2d 512, —— N.E. 2d —— (1974)) (Pet. App. A, p. 26-27).

The petitioners have also alleged the Executive Order is infirm on the grounds that the term "positions sub-

ject to undue influence" is itself so vague and lacking in specificity as to defy definition. Respondent respectfully urges this Court to reject such arguments on the basis that it is manifest that this contention does not present a substantial federal question meriting further argument or review.

It appears that the petitioners are concerned with the fact that the phrase "persons and positions subject to undue influence" has not been defined in other statutes with which petitioners are familiar and that the development laws pertaining to public official disclosure have occurred only in the most recent years. Thus, petitioners fear that they will be denied equal protection and due process of law through the non-uniform application of this term. This contention would be viable if the Executive Order in question had not established the Board of Ethics and invested it with the power to investigate, hold hearings, and promulgate rules and regulations to define this term. It was the intention of the Governor in using such terminology to impose both a positive and negative limitation on the requirements for financial disclosure. The intent of the phrase is obvious: It is unnecessary to require full disclosure from the tens of thousands of state employees who do not hold positions where conflict of interest is likely to arise and to interfere with their judgment in the performance of their duties; it is, however, necessary and entirely proper to require full financial disclosure from those state employees who, in the context of the work which they perform, hold positions where conflicts of interest are likely to arise and interfere with the employees judgment in the performance of their

duties.[8] This distinction between employees who are and who are not required to make the disclosures was obviously the reason why the constitutional convention in drafting the Illinois Constitution of 1970 declined to make disclosure mandatory for all state employees.

The phrase "whose position is subject to undue influence" carries a meaning no less clear and no less definite than the phrases such as "in the course of employment," (Workmen's Compensation Act, Ill. Rev. Stat. ch. 148, § 138.2); "discharge for misconduct" (Unemployment Compensation Act, Ill. Rev. Stat., ch. 48 § 432); "to discriminate against any individual because of his race" (Fair Employment Practices Act, Ill. Rev. Stat., ch. 48, § 853); and "infamous and disgraceful conduct" (Ill. Personnel Code, Ill. Rev. Stat., ch. 127, § 63(B)108(b)(4). In each of the above examples, the intended meaning is clear; nevertheless each phrase is litigated on almost a daily basis because it is necessary to apply the phrase to the specific factual situation involved. Though the application of a phrase with a generally understood meaning to specific factual circumstances does not always lead to an absolute and unitary result, that fact alone does not render the phrase unconstitutional. Thus, in *Stein* v. *Howlett*, 52 Ill. 2d 570, 289 N.E. 2d 409 (1972), *app. dismissed* —— U.S. —— 93 S. Ct. 2750 (1973), the Illinois

8. In the instant case, a total of about 6800 state employees are required to file statements, 800 of whom are appointed by the Governor and 1400 of whom earn more than $20,000. Of the remaining 4400, about 1800 are state policemen. This is but a small fraction of the over 60,000 state employees in agencies and departments covered by the Order.

Supreme Court held that the phrases "constructive control," and "close economic association," were constitutionally permissible (289 N.E. 2d at 414).

Further, the danger of vagueness lies in the failure to give proper notice to those individuals required to act or refrain from acting. In the instant case, no such danger exists. No one is required to file unless personally notified to do so and, having been notified to file, any employee may easily challenge that determination.

Finally, petitioners have alleged that the Executive Order No. 4 constitutes a violation of petitioners' rights under the First Amendment to the Constitution, in that each employee required to file disclose the name of each political organization of which he has been an officer, director, employee or trustee since April 1, 1972. Although the petitioners argue that requiring such disclosures violates their individual right to freedom of association, this contention does not merit review in this situation because such an issue is not presented by the facts in this case.

The only way in which petitioners can make the assertion that the Executive Order requires disclosure of political associations is for the petitioners to ignore the manifest intent of the Executive Order, the language of the Executive Order and of the disclosure statement promulgated by the Board, as well as the decision of the Supreme Court of Illinois itself. Indeed, it is difficult to understand how petitioners have construed the facts in this case to reach the conclusion that political associations *per se* must be revealed.

On their face, neither the Executive Order, the questions, nor the instructions propounded by the Board re-

quest any information regarding political associations. Rather, such documents uniformly refer to individual's economic associations. Paragraph 4(d) of the Executive Order provides that the statement of economic interest shall contain "a statement of close economic associations, indicating the person's position with each business or professional entity to which the person is associated as an officer, employee, director or partner, or in which he has a substantial interest and identifying those entities which derive substantial income from the state or from professional engagements concerning the state."

Pursuant to that requirement, the Board has required that any individual filing a statement disclose the name of all organizations other than the State in which the individual has a substantial interest, including disclosure of individual's position, payments or income to the individual, and the amount of any income which the organization receives from the State.

In passing upon this contention by petitioners, the Supreme Court of Illinois adequately disposed of the suggestion that there was any implicit attempt to obtain information concerning the employees' political associations. Though that court could not find any explicit or implicit requirements for revealing political associations, it protected petitioners from such inquiries, stating:

> "To the extent that question 19 and the related questions go beyond economic interests, they are, in our opinion, beyond the authority of the Board under Executive Order No. 4, . . . . [w]e hold therefore that these questions must be construed as referring only to economic associations. As so limited they are consistent with the executive order and violate no constitutional rights." (57 Ill. 2d 512, ——N.E. 2d—— (1974) (Pet. App. A, p. 35)

Further, it is simply not within the purview of those items deemed relevant in determining potential or actual conflicts of interest for employees to be required to disclose all associations which such employee may have. Rather, the disclosure requirements are specifically limited to "close associations." That is, those associations in which an employee takes an active role by holding a position or receiving payments from the association. It is also entirely relevant for the Board to know the approximate amount of income that such organization receives from the State of Illinois. Such information is necessary to determine whether an employee has ties to organizations outside the scope of his employment sufficient to place him in a position of conflicting loyalties.

As the foregoing discussion indicates, the petitioners have failed to raise any substantial federal questions in their petition. Any federal question which they may have raised is so insubstantial as to not warrant further argument or consideration by this Court. The constitutional questions which petitioners have asserted to be present are either illusory, or have been adequately and correctly disposed of by the decision of the Supreme Court of Illinois, or lack the formal prerequisites for this Court to assume jurisdiction over this matter.

## II.

## THE PETITION SHOULD NOT BE GRANTED BECAUSE THE DECISION OF THE SUPREME COURT OF ILLINOIS IS JUSTIFIED ON INDEPENDENT AND ADEQUATE STATE GROUNDS.

Since petitioners have not controverted the Constitutional standards which the Supreme Court of Illinois applied in the instant case but rather are dissatisfied with

the result of the application of such correct standards to the facts presented, petitioners' attempt to invoke the jurisdiction of this Court is essentially a request to have this Court "second guess" the Supreme Court of Illinois in its analysis and interpretation of the State's Constitution and Laws. The petitioners have failed to recognize that the Illinois Supreme Court, in sustaining the Executive Order and the Board's action, relied upon independent and adequate state grounds which are wholly consistent with the United States Constitution.

The State of Illinois has embarked upon a vigorous program for insuring that officers and employees of the State maintain a high degree of ethical conduct in the performance of their duties. This scheme is demonstrated in the Illinois Constitution of 1970, statutes, rules, and decisions of the Supreme Court of Illinois.

In 1968, the Illinois Governmental Ethics Act[9] was enacted covering certain members of the Legislative and Executive Branches of the State Government. This Act was subsequently extended and its scope enlarged pursuant to the mandate to the legislature contained in the Illinois Constitution of 1970. That contains specific requirements for disclosure of economic interests:

> "Section 2. Statement of Economic Interests."
>
> "All candidates for or holders of state offices and all members of a Commission or Board created by this Constitution shall file a verified statement of their economic interests, as provided by law. The General Assembly by law may impose a similar requirement upon candidates for, or holders of, offices in units of local government and school districts. Statements shall

9. Ill. Rev. Stat. ch. 127, §§ 601-101 *et seq.* (1973).

be filed annually with the Secretary of State and shall be available for inspection by the public. The General Assembly by law shall prescribe a reasonable time for filing the statement. Failure to file a statement within the time prescribed shall result in ineligibility for, or forfeiture of, office. This Section shall not be construed as limiting the authority of any branch of government to establish and enforce ethical standards for that branch." Ill. Const. (1970), art. XIII, sec. 2.

It is Article XIII, § 2 of the 1970 Illinois Constitution, which also provides for the issuance of this Executive Order.

The Judicial Branch of the State government is also required to make similar disclosures of economic interest as provided in Illinois Supreme Court Rule 68 (Ill. Rev. Stat. ch. 110A, § 68 (1973).

In *Stein* v. *Howlett*, 52 Ill. 2d 570, 289 N.E. 2d 409 (1972), *appeal dismissed*, 412 U.S. 925 (1973), this statewide policy and program was sustained by the Supreme Court of Illinois and the prior appeals to this Court on issues similar to those presented herein were dismissed. In that case, plaintiffs contended that the Illinois Governmental Ethics Act was unconstitutional on grounds substantially similar to those in the instant case. The plaintiffs, members of the Legislative Branch of the State government, argued, *inter alia*, that the statute constituted an unconstitutional invasion of the right of privacy and, that it was overbroad and unconstitutionally vague.

The Court recognized that one purpose of the Act was to disclose any abuse of office and to instill in the public trust and confidence in its government and officials and therefore, that broad statutory coverage was necessary in this area.

Recognizing the overriding interest of the State in promoting ethical conduct, the Court stated:

> "[I]t seems appropriate to us to require disclosures of substantial amounts of income and of significant business interests. . . . We believe that the statute as cast reflects the compelling governmental interest which is paramount to the rights of the individual, and that the statute is not overbroad as an unconstitutional invasion of privacy."
>
> (citation omitted) 289 N.E. 2d at 413.

It is well settled that the United States Supreme Court will not exercise jurisdiction over federal claims when the state court decision is founded on independent and adequate state grounds. In *Herb* v. *Pitcairn*, 324 U.S. 117 (1945), this Court recognized that:

> "[T]his Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. . . . The reason is so obvious that it has rarely been thought to warrant statement. It has been found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review would amount to no more than an advisory opinion." *Id.* at 125-26.[10]

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10. *See also*, Fay v. Noia, 372 U.S. 391, 428 (1963) N.A.A.C.P. v. State of Alabama, 357 U.S. 449, 454-55 (1958).

It is submitted that the State of Illinois has manifested an independent and adequate state ground for sustaining the instant decision by reason of the compelling state interest in fostering ethical conduct among State officers and employees, as identified in *Stein* v. *Howlett*, *supra*. Even assuming, *arguendo*, that this Court would decide to exercise jurisdiction to over the petitioners' alleged federal constitutional claims, decisions of this Court indicate that the decision of the Illinois Supreme Court would remain unchanged. Since *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947), this Court has recognized the right of the State to regulate the activities of its employees. Therein, this Court stated:

> "Congress may regulate the political conduct of Government employees 'within reasonable limits' even though the regulation trenches to some extent upon unfettered political action. The determination of the extent to which political activities of governmental employees shall be regulated lies primarily with Congress." 330 U.S. at 102.

The right of the State to regulate the activities of governmental employees was recently reaffirmed in *United States Civil Service Commission* v. *National Association of Letter Carriers, AFL-CIO*, ——U.S.——, 93 S. Ct. 2880 (1973). This Court "unhesitatingly" reaffirmed the *Mitchell* decision, and found that "neither the First Amendment nor any other provision of the Constitution invalidates a law barring this kind of partisan political conduct by federal employees." 93 S. Ct. at 2886.

The right of a state to regulate the political activities of its employees was also recently affirmed in *Broadrick* v. *Oklahoma*, ——U.S.——, 93 S. Ct. 2908 (1973), against the petitioner's claim that the statute was substantially overbroad and unconstitutional on its face.

Throughout these prior decisions, this Court has repeatedly recognized that regulation of the political activities of certain governmental employees does not offend the United States Constitution when that regulation is related to an important Congressional or State interest. This same rationale should be equally applicable when, as in the instant case, the State has a compelling interest of equal magnitude, that of regulating the ethical conduct of its employees.

It is submitted that were this Court to decide to exercise jurisdiction over the petitioners' alleged federal claims that this Court would sustain the decision of the Illinois Supreme Court by applying the rationale in the *Mitchell, Letter Carriers* and *Broadrick* cases.

In summary, the Supreme Court of Illinois has decided the instant case on the basis of independent and adequate state grounds and that the exercise of jurisdiction by this Court to determine the petitioners' alleged federal claims is not warranted.

## III.

## THE PETITION SHOULD NOT BE GRANTED BECAUSE THE ISSUES IN THIS ACTION HAVE NOT REACHED THAT LEVEL OF CONCRETENESS, ADVERSITY AND RIPENESS APPROPRIATE FOR REVIEW BY THIS COURT.

Because of the injunctive restraints placed upon the Board, it has been unable to implement or conform its procedures to the decision of the Supreme Court of Illinois interpreting Executive Order No. 4. Nor has the Board been able to rule on objections heretofore raised by

the petitioners at the time of filing the initial statement of economic interest.

It is apparent then that the relationship between the petitioners and Executive Order No. 4 currently in force and as interpreted by the Board has not developed that degree of concreteness, ripeness and adversity which this Court has previously recognized as appropriate for the exercise of its jurisdiction.

The Court is currently faced with the possibility that the Board, in view of the decision of the Supreme Court of Illinois, may recommend action which will obviate some or all of the petitioners' claims for relief. Until such time as the current fluid state of affairs is resolved in a more definitive manner, it is submitted that the Court's exercise of jurisdiction is not warranted.

This Court has recently enunciated the test for determining whether a challenge to an administrative regulation is ripe for review. Although the Board is composed of individuals appointed by the Governor, the rationale is applicable. In *Toilet Goods Association, Inc.* v. *Gardner*, 387 U.S. 158 (1967), the Court was faced with a challenge to certain regulations promulgated by the Commissioner of Foods and Drugs on the grounds that he had exceeded his statutory authority. The regulation contained penalties which the Commissioner *could* impose for non-compliance.

In refusing to exercise jurisdiction over one of the regulations, the Court stated:

> "In determining whether a challenge to an administrative regulation is ripe for review a two-fold inquiry must be made: first to determine whether the issues tendered are appropriate for review, and sec-

ond to assess the hardship to the parties if judicial relief is denied at this stage." 387 U.S. at 162.

The Court found the issues inappropriate for review because, *inter alia*, it could not determine whether the regulation would be enforced by the Commissioner. Further, the Court felt that judicial appraisal would be more appropriate in the "context of a specific application of the regulation than could be the case in the framework of the generalized challenge made here." 387 U.S. at 166.

Further, the Court found that the petitioners would suffer no irremediable adverse consequences by requiring a later challenge to the regulation upon the petitioner's refusal to comply.

In the instant case, it is submitted that the requisites of ripeness outlined in *Toilet Goods Association, supra*, have not been met. First, the issues are not appropriate for judicial resolution as the Board has not had an opportunity to implement the findings of the Supreme Court of Illinois so that the validity of Executive Order No. 4 can be determined in a specific application which reflects the Board's appraisal of that decision. To attempt to forecast the manner in which the Board will handle this decision would require the Court to indulge in conjecture and speculation.

Secondly, the petitioners have not shown that they will suffer any irremediable adverse consequences flowing from the Court's refusal to review the Board's action at this time. The Board has not clarified its position on public disclosure, and has postponed any such display until hearings have been conducted. Further, the Board has not threatened any of the petitioners with enforcement of penalties under the Executive Order.

It is well settled that federal courts established pursuant to Article 3 of the United States Constitution cannot render advisory opinions. Further, when constitutional issues are presented for adjudication, there must be "concrete legal issues presented in actual cases, not abstractions." *United Public Workers* v. *Mitchell*, 330 U.S. 75, 89 (1947).[11]

The petitioners, however, have requested this Court to review the activities of the Board of Ethics acting pursuant to Executive Order No. 4 before the Board has had an opportunity to consider and to act upon the decision of the trial court and the Supreme Court of Illinois.

Any exercise of jurisdiction by the Court at this time would require the Court to speculate as to what action the Board might take in dealing with the petitioners' claims. The Court would, in effect, be bypassing the procedure previously established by the Board to handle objections and thereby denying the Board and the petitioners the opportunity to resolve the current disputes, thus avoiding an unnecessary constitutional confrontation. In the alternative, the Board and petitioners will be precluded from an opportunity to sharpen and define the issues which divide the Board and the petitioners so that the Court in a later exercise of jurisdiction would be presented with the concrete legal issues and specific factual situations appropriate for judicial review.

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11. *See*, Electric Bond & Share Co. v. Securities Exchange Commission, 303 U.S. 419, 443 (1938); United States v. Appalachian Electric Power Co., 311 U.S. 377, 423 (1941); State of Alabama v. State of Arizona, 291 U.S. 286, 291 (1934); *see also*, United Public Workers v. Mitchell, 330 U.S. 75, 89 (1947) n. 20 and cases cited therein.

## CONCLUSION

Wherefore, respondent respectfully submits that the instant petition does not present a federal question of substance, that any federal question presented has previously been determined by this Court and is so insubstantial as not to merit further argument, that the decision of the Supreme Court of Illinois in this matter is manifestly correct, that there exists adequate independent state grounds upon which to affirm the decision below, which grounds are consistent with all relevant precepts of the Constitution of the United States, and that such issues as may be presented are not ripe for adjudication by this Court, and respondent, therefore, respectfully urges this Honorable Court to deny petitioners' petition for writ of certiorari to the Supreme Court of the State of Illinois.

Respectfully submitted,

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